Savant-Asia Sdn Bhd v Sunway PMI-Pile Construction Sdn Bhd

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NOS W-02–244–2004 AND W-02–392 OF 2005
DENIS ONG, ABDUL AZIZ MOHAMAD AND TENGKU BAHARUDIN SHAH JJCA
8 FEBRUARY 2007

Civil Procedure — Disposal of action without trial — Disposal of case on point of law — Discretion of court, how invoked — Whether exercise of such discretion open to appellate intervention — Rules of the High Court 1980 O 14A

Civil Procedure — Disposal of action without trial — Disposal of case on point of law — Disputes of fact in existence — Whether case suitable for determination under Rules of the High Court 1980 O 14A — Rules of the High Court 1980 O 14A

Civil Procedure — Trial — Preliminary issue to be tried — Power of court to order trial of preliminary issue before trial of main action — Whether such power of court to be exercised only where trial of such issue results in substantial saving of time and expenditure — Rules of the High Court 1980 O 33

Civil Procedure — Trial — Preliminary issue to be tried — Disputes of fact in existence — Whether case suitable for trial of preliminary issue before trial of main action — Rules of the High Court 1980 O 33

Companies and Corporations — Winding up — Petition — Advertisement of petition — Petition for winding up advertised in newspaper several months before hearing of petition — Whether such advertisement or petition invalid

Companies and Corporations — Winding up — Petition — Petition for winding up filed and served — Debt fully paid to petitioner before hearing of petition — Whether petitioner nevertheless obliged to advertise petition

Tort — Defamation — Libel — Defence of absolute and qualified privilege — Malice, consideration and relevance of

The respondent owed the first appellant a sum of RM141,750. The first appellant filed and served upon the respondent a winding up petition. The second appellant — a legal firm — represented the first appellant in the winding-up proceedings.

On 4 May 1999 the respondent gave the first appellant a cheque for RM141,750, the full amount of the debt. The first appellant banked in the cheque on 6 May 1999, which cheque was cleared on 11 May 1999. However, on 12 May 1999 the petition was published in *The Star* newspaper. The petition was in fact fixed for hearing on 3 September 1999. The respondent thus sued the appellants in the High Court for defamation, specifically libel, on account of the publication in *The Star* newspaper. The respondent alleged that there was malicious intention on the part of the appellants; since it had settled the debt. The respondent further maintained that it was a term of the settlement that legal proceedings would be discontinued and withdrawn after the cheque had cleared. In their defences, both appellants claimed inter alia absolute privilege and/or alternatively qualified privilege. The appellants thereafter separately applied for the determination of certain preliminary issues pursuant to O 14A or O 33 rr 2 and 5 of the Rules of the High Court 1980. The second appellant's issue for determination was whether by reason of absolute and/or qualified privilege, the respondent's claim was maintainable. The first appellant sought to determine the applicability of its defence of absolute privilege to the circumstances before trial. However, the High Court directed the first appellant to adopt the issue as framed by the second appellant, and eventually dismissed both applications with costs. In his grounds, the High Court judge was of the view that since there was an allegation of malicious intent, which was denied by the appellants, it was inappropriate to consider qualified privilege as a preliminary issue without the need for a trial. Further, he held that the appellants were misconceived in claiming absolute privilege since it was not mandatory for them to advertise the petition. The appellants filed separate appeals to the Court of Appeal, which appeals were heard together.

Held, by majority dismissing the appeal with costs:

(1) (per **Tengku Baharudin Shah JCA**, delivering majority judgment) The appellants could not resile from their pleaded position. They both pleaded the defence of absolute and qualified privileges and the question framed and adopted also stated both defences (see para 43).

(2) (per **Tengku Baharudin Shah JCA**, delivering majority judgment) Order 14A of the RHC provides for an accelerated final disposal of an action at an interlocutory stage. This is to save time and expense which would otherwise arise if the action were to proceed to full trial. It empowers the court to make a final determination of a question of law without the need of an application under O 33 r 5 of the RHC for the determination of a preliminary issue. In order to invoke O 14A: (i) the question of law or construction must be suitable for determination without full trial of an action; and (ii) such determination should be final as to the entire cause or matter (see para 44).

(3) (per **Tengku Baharudin Shah JCA**, delivering majority judgment) In the instant case, there were disputes of fact which could only be resolved by evidence at a full trial. As an issue of law, the question posed failed the test of suitability for determination under O 14A of the RHC. It assumed facts not discernible from the statement of claim and defence, hence it was inappropriate for pre-trial determination (see para 47).

(4) (per **Tengku Baharudin Shah JCA**, delivering majority judgment) Concerning the issue of absolute privilege, there was not only a factual dispute but also a misconception of the law. In the instant case, whether there was any necessity to publish the petition and whether such publication was done pursuant to the requirements of the law were neither proven nor admitted. The proposed issue was also obscure and not discernible from the pleadings. The issue as framed was neither suitable nor possible for determination under O 14A (see paras 48–50).

(5) (per **Tengku Baharudin Shah JCA**, delivering majority judgment) Under O 33 r 2 of the RHC, which is wider in scope than O 14A, the court will not exercise its power to order a preliminary point of law to be tried unless the trial of that issue will result in a substantial saving of time and expenditure in respect of the trial of the action. On the pleadings, the question framed, ignored the bone of contention between the parties in favour of erroneous assumptions of fact and law that the publication was made pursuant to law. This obscurity of fact and law had to first be determined before the question could be answered (see paras 51–52, 55).

(6) (per **Tengku Baharudin Shah JCA**, delivering majority judgment) In the instant case, the issue as framed incorporated both defences of absolute privilege and qualified privilege, hence two issues. Assuming that the facts were undisputed or admitted — which they were not — the answers would not dispose of the entire cause or matter unless held in the appellant's favour. It was not therefore a question that was appropriate for preliminary determination under O 33 as it would neither save time nor cost (see para 56).

(7) (per **Tengku Baharudin Shah JCA**, delivering majority judgment) In the instant case, there was no doubt that the High Court judge was exercising his judicial discretion when he refused the appellants' application under O 14A or O 33 r 2 of the RHC. An appellate court would not generally interfere with such decision unless it was plainly wrong. Here, the Court of Appeal did not find any cause to intervene (see para 58).

(8) (per **Abdul Aziz Mohamad JCA** dissenting) It was for the very reason that it had received full payment of its debt that the first appellant had to advertise the petition. By virtue of s 219(2) of the Companies Act 1965 the winding up of the respondent had commenced on 22 March 1999 when the winding up petition was presented. The money that the first appellant received from the respondent on 11 May 1999 did not legally belong to the first appellant alone because the payment constituted a disposition of the property of the respondent made after the commencement of the winding up, which s 223 declares to be void in the absence of a court order otherwise. Other creditors, if there were any, had an interest in it. By virtue of s 226(4), if there had been a winding up order, it would operate in favour of them as well (see para 9).

(9) (per **Abdul Aziz Mohamad JCA** dissenting) The appellant would have been in a safe position as regards the payment of RM141,750 only if there were no other creditors, but it would not be in a position to know that there would be no other creditors unless it advertised the petition. To omit to advertise the petition would directly assist the appellant to surreptitiously keep the money

exclusively to itself, in the event that there were other creditors. The appellant was thus bound to advertise the petition. The advertisement was therefore absolutely privileged (see para 10).

(10) (per **Abdul Aziz Mohamad JCA** dissenting) The advertisement in this case, although published three or four months before the date of hearing, would not have invalidated the advertisement or the petition. In any event the question of the proper time to advertise the petition did not have any bearing on the soundness of the (first) appellant's argument that it was bound to advertise the petition in any event so as not to be at risk as regards the payment that it had received (see para 12).

(11) (per **Abdul Aziz Mohamad JCA** dissenting) The respondent's assertion that legal proceedings would be discontinued and withdrawn after the cheque had cleared merely emphasized the need for the cheque to be cleared before the petition would be discontinued or withdrawn. It did not imply that the discontinuance or withdrawal would be done forthwith or without first advertising the petition (see para 13).

(12) (per **Abdul Aziz Mohamad JCA** dissenting) Although the issue that was framed for the first appellant, which was an adoption of the issue framed by the second appellant, included also the defence of qualified privilege, the first appellant's application concerned only the defence of absolute privilege. In any event the issue as adopted for the first appellant concerned also the defence of absolute privilege, to which the question of malice would not be relevant. If such defence availed the first appellant, it would succeed in defeating the respondent's claim, making the defence of qualified privilege unnecessary. The judge therefore erred in dismissing the application on the first ground in not considering that the first appellant also relied on the defence of absolute privilege and that the issue posed also related to that defence (see para 15).

[Bahasa Malaysia summary

Responden berhutang dengan perayu pertama sejumlah RM141,750. Perayu pertama telah memfailkan dan menyerahkan ke atas responden petisyen penggulungan. Perayu kedua — sebuah firma guaman — mewakili perayu pertama dalam prosiding penggulungan. Pada 4 Mei 1999 responden telah memberikan cek sejumlah RM141,750 kepada perayu pertama sebagai jumlah penuh hutang tersebut. Perayu pertama telah memasukkan ke dalam bank cek tersebut pada 6 Mei 1999, yang man cek itu telah dijelaskan pada 11 Mei 1999. Namun, pada 12 Mei 1999 petisyen tersebut telah disiarkan dalam akhbar *The Star*. Petisyen tersebut pada hakikatnya telah ditetapkan untuk perbicaraan pada 3 September 1999. Responden oleh itu telah menyaman perayu-perayu di Mahkamah Tinggi untuk fitnah, khususnya libel, berdasarkan penyiaran dalam akhbar *The Star*. Responden mengatakan bahawa terdapat niat jahat di pihak perayu-perayu; memandangkan ia telah melangsaikan hutang. Responden seterusnya menegaskan bahawa terdapat terma penyelesaian bahawa prosiding undang-undang akan diberhentikan dan ditarik balik selepas cek dikeluarkan. Dalam pembelaan mereka, kedua-dua perayu menuntut antara lain perlindungan mutlak dan/atau perlindungan bersyarat. Perayu-perayu kemudiannya masing-masing memohon ditentukan

beberapa isu-isu permulaan menurut A 14A atau A 32 kk2 dan 5 Kaedah-Kaedah Mahkamah Tinggi 1980. Isu perayu kedua yang perlu ditentukan adalah sama ada dengan alasan perlindungan mutlak dan/atau bersyarat, dakwaan responden boleh dikekalkan. Perayu pertama memohon ditentukan pemakaian pembelaan perlindungan mutlaknya terhadap keadaan di hadapan perbicaraan. Bagaimanapun, Mahkamah Tinggi telah mengarahkan perayu pertama menggunakan isu tersebut seperti yang dibentuk oleh perayu kedua, dan akhirnya menolak kedua-dua permohonan dengan kos. Dalam alasannya, hakim Mahkamah Tinggi berpendapat bahawa memandangkan terdapat pengataan tentang niat jahat, yang dinafikan oleh perayu-perayu, adalah tidak sesuai untuk mempertimbangkan perlindungan bersyarat sebagai isu permulaan tanpa memerlukan satu perbicaraan. Bahkan, beliau memutuskan bahawa perayu-perayu telah salah tanggap dalam menuntut perlindungan mutlak memandangkan ia bukan mandatori untuk mereka menyiarkan petisyen tersebut. Perayu-perayu telah memfailkan rayuan-rayuan berasingan ke Mahkamah Rayuan, yang mana rayuan-rayuan tersebut telah didengar bersama.

Diputuskan, dengan majoriti menolak rayuan tersebut dengan kos:

(1) (oleh **Tengku Baharudin Shah HMR**, menyampaikan penghakiman majoriti) Perayu-perayu menarik diri daripada kedudukan rayuan mereka. Kedua-dua mereka telah merayu pembelaan perlindungan mutlak dan bersyarat dan persoalan yang dibentuk dan digunakan juga menyatakan kedua-dua pembelaan tersebut (lihat perenggan 43).

(2) (oleh **Tengku Baharudin Shah HMR**, menyampaikan penghakiman majoriti) Aturan 14A KMT memperuntukkan untuk satu penyelesaian muktamad yang segera suatu tindakan di peringkat interlokutori. Ini adalah untuk menjimatkan masa dan perbelanjaan untuk meneruskan dengan perbicaraan penuh. Ia memberi kuasa kepada mahkamah untuk membuat keputusan muktamad suatu persoalan undang-undang tanpa memerlukan satu permohonan di bawah A 33 k 5 KMT untuk penentuan isu permulaan. Bagi tujuan A 14A: (i) persoalan undang-undang atau pembentukan harus sesuai untuk penentuan tanpa perbicaraan penuh suatu tindakan itu; dan (ii) penentuan tersebut hendaklah muktamad terhadap keseluruhan kausa atau perkara (lihat perenggan 44).

(3) (oleh **Tengku Baharudin Shah HMR**, menyampaikan penghakiman majoriti) Dalam kes ini, terdapat pertikaian tentang fakta yang hanya boleh diselesaikan melalui keterangan di perbicaraan penuh. Berkaitan isu undang-undang, persoalan yang dikemukakan gagal ujian kesesuaian untuk penentuan di bawah A 14A KMT. Ia mengandaikan fakta-fakta yang tidak dapat ditanggapkan daripada penyataan tuntutan dan pembelaan, justeru itu ia tidak sesuai untuk ditentukan pra perbicaraan (lihat perenggan 47).

(4) (oleh **Tengku Baharudin Shah HMR**, menyampaikan penghakiman majoriti) Berhubung isu perlindungan mutlak, ia bukan sahaja pertikaian faktual tetapi satu tanggapan salah undang-undang. Dalam kes ini, sama ada terdapat apa-apa keperluan untuk menerbitkan petisyen tersebut dan sama ada penerbitan tersebut dilakukan menurut keperluan-keperluan undang-undang tidak dibuktikan maupun diakui. Isu yang dicadangkan juga tidak jelas

daripada pliding-pliding tersebut. Isu seperti yang dibentuk tidak sesuai dan juga tidak berkemungkinan untuk ditentukan di bawah A 14A (lihat perenggan 48–50).

(5) (oleh **Tengku Baharudin Shah HMR**, menyampaikan penghakiman majoriti) Di bawah A 32 k 2 KMT, yang mempunyai skop lebih luas daripada A 14A mahkamah tidak akan menggunakan kuasanya untuk memerintahkan satu perkara pendahuluan undang-undang yang perlu dibicarakan kecuali perbicaraan untuk isu tersebut boleh menjimatkan mada dan perbelanjaan berkaitan perbicaraan tindakan tersebut. Berdasarkan pliding-pliding tersebut, persoalan yang dibentuk, tidak menghiraukan hujah asas antara pihak-pihak yang menyebelahi andaian yang salah terhadap fakta dan undang-undang bahawa penerbitan tersebut telah dibuat menurut undang-undang. Fakta dan undang-undang yang tidak jelas ini perlu ditentukan terlebih dahulu sebelum persoalan tersebut boleh dijawab (lihat perenggan 51–52, 55).

(6) (oleh **Tengku Baharudin Shah HMR**, menyampaikan penghakiman majoriti) Dalam kes ini, iau seperti yang dibentuk memasukkan kedua-dua pembelaan perlindungan mutlak dan perlindungan bersyarat, justeru itu timbul dua isu tersebut. Dengan andaian bahawa fakta-fakta tersebut tidak dipertikaikan atau diakui — yang mana ianya tidak — jawapannya tidak akan menyelesaikan keseluruhan kausa atau perkara tersebut kecuali berpihak kepada perayu. Oleh itu ia bukan satu persoalan tentang kesesuaian untuk satu penentuan pendahuluan di bawah A 33 kerana ia tidak menjimatkan masa maupun kos (lihat perenggan 56).

(7) (oleh **Tengku Baharudin Shah HMR**, menyampaikan penghakiman majoriti) Dalam kes ini, tidak diragui bahawa hakim Mahkamah Tinggi telah menggunakan budi bicara kehakimannya semasa menolak permohonan perayu-perayu di bawah A 14A atau A 33 k 2 KMT. Mahkamah rayuan pada amnya tidak campur tangan dengan keputusan sedemikian kecuali ia jelas salah. Di sini, Mahkamah Rayuan tidak mendapati apa-apa sebab untuk campur tangan (lihat perenggan 58).

(8) (oleh **Abdul Aziz Mohamad HMR** menentang) Adalah disebabkan ia telah menerima bayaran penuh hutangnya yang perayu pertama perlu mengiklankan petisyen tersebut. Menurut s 219(2) Akta Syarikat 1965 penggulungan responden bermula pada 22 Mac 1999 apabila petisyen penggulungan dikemukakan. Wang yang perayu pertama terima daripada responden pada 11 Mei 1999 tidak secara sah dimiliki oleh perayu pertama sahaja kerana bayaran tersebut membentuk satu pelupusan harta responden yang dibuat selepas penggulungan dimulakan, yang mana s 223 mengisytiharkan terbatal tanpa perintah mahkamah sebaliknya. Pemiurang yang lain, jika ada, mempunyai kepentingan dalamnya. Menurut s 226(4), jika terdapat perintah penggulungan, ia akan menyebelahi mereka juga (lihat perenggan 9).

(9) (oleh **Abdul Aziz Mohamad HMR** menentang) Perayu mungkin berada dalam kedudukan selamat berhubung bayaran RM141,750 hanya jika tiada pemiutang lain, tetapi ia bukan dalam kedudukan untuk mengetahui jika terdapat pemiutang lain kecuali ia mengiklankan petisyen tersebut. Untuk tidak mengiklankan petisyen tersebut secara langsung membantu

perayu secara diam-diam menyimpan wang untuk dirinya sendiri, sekiranya tiada pemiutang lain. Perayu dengan itu terikat untuk mengiklankan petisyen tersebut. Iklan tersebut merupakan perlindungan yang mutlak (lihat perenggan 10).

(10) (oleh **Abdul Aziz Mohamad HMR** menentang) Iklan tersebut dalam kes ini meskipun disiarkan tiga atau empat bulan sebelum tarikh perbicaraan, tidak mungkin membuktikan iklan atau petisyen itu adalah tidak benar. Dalam apa keadaanpun persoalan tentang masa yang sewajarnya untuk mengiklankan petisyen tersebut tidak mempunyai kesan ke atas kewajaran hujah perayu (pertama) yang ia terikat untuk mengiklankan petisyen tersebut dalam apa keadaanpun agar tidak berhadapan dengan risiko berhubung bayaran yang diterima olehnya (lihat perenggan 12).

(11) (oleh **Abdul Aziz Mohamad HMR** menentang) Hujah responden bahawa prosiding undang-undang akan diberhentikan dan ditarik balik selepas cek dijelaskan hanya menekankan keperluan untuk cek itu dijelaskan sebelum petisyen tersebut dibatalkan atau ditarik balik. Ia tidak membayangkan bahawa penghentian atau penarikan balik itu akan dilakukan dengan serta merta atau tanpa terlebih dahulu mengiklankan petisyen tersebut (lihat perenggan 13).

(12) (oleh **Abdul Aziz Mohamad HMR** menentang) Meskipun isu yang dibentuk untuk perayu pertama, yang diambil dari isu yang dibentuk oleh perayu kedua, termasuklah juga pembelaan tentang perlindungan bersyarat, permohonan perayu pertama adalah hanya berkaitan pembelaan perlindungan mutlak. Dalam apa keadaanpun isu yang digunakan untuk perayu pertama juga berkaitan pembelaan perlindungan mutlak, yang mana persoalan niat jahat adalah tidak relevan. Sekiranya pembelaan tersebut tidak berhasil ia akan berjaya menggagalkan tuntutan responden, menjadikan pembelaan untuk perlindungan bersyarat tidak diperlukan. Oleh demikian hakim tersebut terkhilaf kerana menolak permohonan tersebut atas alasan pertama tanpa mempertimbangkan bahawa perayu pertama juga bergantung kepada pembelaan perlindungan mutlak dan bahawa isu yang dikemukakan juga berkaitan dengan pembelaan tersebut (lihat perenggan 15).]

Notes

For cases on disposal of case on point of law, see 2(1) *Mallal's Digest* (4th Ed, 2007 Reissue) paras 2537–2540.

For cases on libel, see 12 *Mallal's Digest* (4th Ed, 2005 Reissue) paras 369–527.

For cases on petition, see 3(1) *Mallal's Digest* (4th Ed, 2006 Reissue) paras 1321–1456.

For cases on preliminary issue to be tried, see 2(3) *Mallal's Digest* (4th Ed, 2007 Reissue) paras 7862–7867.

Cases referred to

Chan Kum Loong v Hii Sui Eng [1980] 1 MLJ 313 (refd)
Federal Insurance Co v Nakano Singapore (Pte) Ltd (1992) 1 SLR 390 (refd)
GKM Amal Bhd v Bank Utama (M) Bhd [2004] 3 MLJ 12 (refd)
Isaacs & Sons Ltd v Cook [1925] 2 KB 391 (refd)
Kredin Sdn Bhd v Development & Commercial Bank Bhd [1995] 3 MLJ 304 (refd)

A *Lincoln v Daniels* [1962] 1 QB 237 (refd)
Petro-Pipe Industries (M) Sdn Bhd v Fieldwork Engineering Sdn Bhd [2003] 1 MLJ 417 (refd)
Thiruchelvasegaram a/l Manickavasegar v Mahadevi a/p Nadchatiram [2000] 5 MLJ 465 (refd)

B **Legislation referred to**
Companies Act 1965 ss 219(2), 221(2)(e), 223, 226(4)
Companies (Winding Up) Rules 1972 rr 24, 33(1)(b)
Rules of the High Court 1980 O 14A, O 33 rr 2, 5

C **Appeal from**: Civil Suit No S5–23–87 of 1999 (High Court, Kuala Lumpur)

Dato' Loh Siew Cheang (Cindy Goh and Kelvin Seet with him) (Cheang & Ariff) for first appellant.
T Sagadaven (Shearn Delamore) for the second appellant.
D *K Venkateswara (A Shirani with him) (David Lingam & Co) for the respondents.*

Abdul Aziz Mohamad JCA (delivering dissenting judgment):

E **[1]** In the High Court the respondent company, as plaintiffs, sued the appellant company for defamation on account of the publication in *The Star* newspaper on 12 May 1999 of the advertisement pursuant to r 24 of the Companies (Winding Up) Rules 1972 of a winding up petition by the appellant company against the respondent company. Sued together with the appellant company, the first defendants in the High Court, were the solicitors who acted for the appellant company in the F winding-up proceedings, as the second defendants ('the winding up solicitors'). In the defamation action the appellant company and the winding up solicitors were separately represented. Besides other defences, the appellant company claimed, in para 9 of their statement of defence, absolute privilege and, in para 10, as a further and alternative defence, qualified privilege. Besides other defences, the winding up G solicitors claimed 'absolute and/or qualified privilege'.

[2] The appellant company and the winding up solicitors separately applied for the determination of a certain preliminary issue or issues pursuant to O 14A or O 33 rr 2 and 5 of the Rules of the High Court 1980. The learned judge (Mohd Hishamudin J) H dismissed the applications. By a majority (myself dissenting), their separate appeals, which we heard together, were dismissed. These grounds of decision pertain only to the appellant company's case and appeal, as I am writing them specially for the purpose of their appeal to the Federal Court. I have received no indication of an appeal to the Federal Court by the winding up solicitors.

I **[3]** The undisputed facts in the appeal were as follows. The appellants' winding up petition was grounded on a sum of RM141,750 owed by the respondents to the appellants. It was filed on 22 March 1999 and served on the respondents on 23 (or 27) April 1999. On 4 May 1999 the respondents tendered to the appellants a cheque for RM141,750, the full amount of the debt. On 6 May 1999 the

appellants presented the cheque to the bank for clearance. On 11 May 1999 the cheque was cleared. On 12 May 1999 the petition was published in The Star newspaper. 3 September 1999 was the date fixed for the hearing of the petition. A

[4] Paragraph 6 of the respondents' statement of claim averred the initiation of the winding up petition by the appellants. Paragraph 7 averred the service of the petition on the respondents. In para 10 the respondents claimed that, although the hearing date of the petition was 3 September 1999, they had attended to the matter immediately and expeditiously, and therefore they were 'surprised and shocked' by the advertisement 'when there was seemingly no urgency to warrant the same and further compounded by the fact that the [appellants] had received and [were] in possession of payment by the [respondents], well before the date of publication of the said advertisement'. B C

[5] I have set out the gist of those three paragraphs of the statement of claim, as far as they concerned the appellants, because those paragraphs were mentioned in the issue to be determined, after its formulation was decided by the learned judge. The winding up solicitors had formulated the issue on their part and the learned judge, so he said, directed the appellants to adopt it. The issue, as applied to the appellants, was as follows: D

> Whether upon the facts alleged and pleaded in paras 6, 7 and 10 of the statement of claim and the defence of absolute and/or qualified privilege raised and pleaded in paras 9 and 10 of the statement of defence of the first defendant, the plaintiff's claim is maintainable in law and/or in fact by reason of absolute and/or qualified privilege. E

[6] According to para 9.2 of the appellants' statement of defence, the absolute privilege for the advertisement was claimed on the basis that it 'was published as part of the (appellants') statutory obligation in prosecuting the petition'. It was, the appellants' counsel informed us, the second of the three categories of absolute privilege covering proceedings in or before a court of justice that Devlin LJ spoke of in *Lincoln v Daniels* [1962] 1 QB 237, where at p 257 the second category was described in the following words: F G

> The second covers everything that is done from the inception of the proceedings onwards and extends to all pleadings and other documents brought into existence for the purpose of the proceedings and starting with the writ or other document which institutes the proceedings

H

[7] The learned judge gave two reasons for dismissing the appellants' application as well as that of the winding up solicitors. I will deal first with the second reason, which was given in the following words:

> Further, there is another difficulty: the defendants' application is based on a misconception of the law — the misconception being that under r 24 of the Company (Winding Up) Rules 1972 it was mandatory for them to advertise the petition. True, it was mandatory for them to advertise the petition within the prescribed period: but it was only mandatory if the defendants intended to proceed with the hearing of the petition. In the present case, however, it was clear to the defendants that they had no reason to proceed with the petition as the debts had already been settled. I

[8] In support of that reason the respondents' counsel submitted in the appeal that since the appellants' debt had been settled, they were not obliged to advertise the petition and that the only step that they had to take in the petition was to file a notice of its discontinuance.

[9] After considering the submissions on both sides, I arrived at the conclusion that it was for the very reason that they had received full payment of their debt that the appellants had to advertise the petition. By virtue of s 219(2) of the Companies Act 1965 the winding up of the respondent company had commenced on 22 March 1999 when the winding up petition was presented. The money that the appellants received from the respondents on 11 May 1999 did not legally belong to the appellants alone because the payment constituted a disposition of the property of the respondent company made after the commencement of the winding up, which s 223 declares to be void in the absence of a court order otherwise. Other creditors, if there were any, had an interest in it. By virtue of s 226(4), if there had been a winding up order, it would operate in favour of them as well. As Siti Norma Yaakob JCA (as she then was) said in this court in *Kredin Sdn Bhd v Development & Commercial Bank Bhd* [1995] 3 MLJ 304 at p 309:

> Thus, s 219 was enacted specially as a means to protect the creditors, particularly the unsecured creditors who must be treated equally when it comes to their executing their claims against the company in debt. That equality is maintained even during the interim period between the date of the presentation of the petition for winding up to the date when the order for winding up is made. During that period, the law sees to it that the assets or effects of the company will not be dissipated to enrich one or more unsecured creditors at the expense of the other unsecured creditors.

[10] The appellants would have been in a safe position as regards the payment of RM141,750 only if there were no other creditors, but they would not be in a position to know that there would be no other creditors unless they advertised the petition. Then, on the date of the hearing of the petition, 3 September 1999, if there should be no other creditors, they could apply to the court under s 221(2)(e) to be allowed to withdraw the petition. If they had not advertised the petition, and they applied on 3 September 1999 or on an earlier date for leave to withdraw the petition on the ground that they had received full payment of their debt, the court would be likely to refuse leave and fix another date for the hearing of the petition and direct that the petition be advertised in order to ascertain whether there were other creditors who might claim interest in the sum of RM141,750. As the appellants' counsel said, to omit to advertise the petition would directly assist the appellants to surreptitiously keep the money exclusively to themselves, in the event that there were other creditors. For those reasons, I concluded that the appellants were bound to advertise the petition and that, therefore, the advertisement was absolutely privileged.

[11] The respondents' counsel informed us that as a matter of fact there were no other creditors. That may have been so, although it was only said from the bar, but the appellants could not know or be certain of the fact unless the petition was advertised. The respondents' counsel also informed us that the appellants did after all withdraw the petition prior to the hearing date, 3 September 1999, but that was also a statement from the bar, and there was no information before us as to the exact date

and the circumstances of the withdrawal to enable us to judge of the propriety of, or the justification for, the early withdrawal. The matter of the early withdrawal of the petition was not part of the facts on which the appeal was to be decided. It did not even feature in the pleadings.

[12] The respondents' counsel raised the point that the appellants breached r 24 of the Companies (Winding Up) Rules 1972 in advertising on 12 May 1999 the petition that was fixed for hearing for 3 September 1999 because r 24 requires the advertising to be done 'seven clear days or such longer time as the Court may direct before the hearing'. The problem posed by the requirement that, without an order for longer time, the advertising must be done exactly seven clear days before the hearing date was considered by this court in *GKM Amal Bhd v Bank Utama (M) Bhd* [2004] 3 MLJ 12, where the petition was advertised, without court direction for a longer time, twenty-two days before the hearing date. This court held that there was a breach of r 24, but the breach did not cause injustice and 'was a technicality amounting to a mere irregularity curable under r 194(1)'. Earlier, in *Petro-Pipe Industries (M) Sdn Bhd v Fieldwork Engineering Sdn Bhd* [2003] 1 MLJ 417, which was not referred to in the *GKM Amal* case, Mohd Hishamudin J in the High Court gave reasons for saying that to construe 'seven clear days' in r 24 as meaning exactly seven clear days would result in absurdity and expressed the view that the words meant at least seven clear days. Following the *GKM Amal* decision, I was inclined to think that the advertisement in this case, although published three or four months before the date of hearing, would not have invalidated the advertisement or the petition, but in any event I did not see that the question of the proper time to advertise the petition had any bearing on the soundness of the appellants' argument that they were bound to advertise the petition in any event ′so as not to be at risk as regards the payment that they had received.

[13] Finally, in connection with the learned judge's second reason, I will mention that the respondents' counsel asserted that the appellants agreed that it was a term of the payment that legal proceedings would be discontinued and withdrawn after the cheque had cleared. This assertion was based on para 5.3 of the appellants' statement of defence. But in that paragraph the appellants were referring to what the respondents themselves said in their letter of 29 April 1999 which was handed to the appellants on 4 May 1999 together with the payment cheque. The respondents' letter, according to para 5.3, 'expressly provided … that legal proceedings against the [respondents] would only be discontinued and withdrawn after confirmation that the … cheque had been cleared'. Even if the appellants had agreed with what the respondents was said to have said in the letter, its wording, as given, especially the word 'only', merely emphasized the need for the cheque to be cleared before the petition would be discontinued or withdrawn. They did not imply that the discontinuance or withdrawal would be done forthwith or without first advertising the petition.

[14] The learned judge's first reason for dismissing the appellants' application was apparently the principal reason, the second reason, which I have dealt with, being said to be 'another difficulty'. The first reason was expressed in the following words:

> I have dismissed the defendants' applications on the ground that since there is an allegation by the plaintiff of malicious intent on the part of the defendants, which the defendants deny (hence there is a dispute on a material fact), I do not think that it is appropriate that I should consider the issue of qualified privilege as raised by the defendants as a preliminary issue and without the need for a trial. It would have been a different matter if malicious intent is not an issue, or that the allegation of malicious intent is not disputed by the defendants

[15] The judge was speaking of 'malicious intent' in relation to the defence of qualified privilege. But although the issue that was framed for the appellants, which was an adoption of the issue framed by the winding up solicitors, included also the defence of qualified privilege, the appellants' application by summons in chambers concerned only the defence of absolute privilege. In any event the issue as adopted for the appellants concerned also the defence of absolute privilege, to which the question of malice would not be relevant and on which, if it availed the appellants, they would succeed in defeating the respondents' claim, making the defence of qualified privilege unnecessary. The learned judge therefore erred in dismissing the application on the first ground in not considering that the appellants also relied on the defence of absolute privilege and that the issue posed also related to that defence.

[16] For those reasons I concluded that the learned judge erred in his grounds for dismissing the appellants' application and I decided that the appeal should be allowed and the issue should be decided in the appellants' favour.

Tengku Baharudin Shah JCA (delivering majority judgment):

[17] By the decision of a majority (Abdul Aziz Mohamad JCA dissenting) we dismissed both these appeals with costs. Denis Ong Jiew Fook JCA, the other member of the court who endorsed the decision of the learned judge in the court below, has unfortunately retired from office and is therefore not privy to the preparation of this majority judgment of the court. Hence, while the conclusion arrived at by the both of us are common, the grounds herein are entirely mine.

BACKGROUND

[18] The common respondent in these appeals, who was the plaintiff in the High Court, sued the appellants for libel on account of the publication in *The Star* newspaper, of an advertisement pertaining to a winding up petition against the respondent. The appellant in Appeal No W-02–392–2005 ('the second appellant') acted as solicitors for the appellant in Appeal No W-02–244–2004 ('the first appellant') who initiated the petition and caused the said publication. They were both sued as the second and first defendants respectively in the defamation action and were separately represented in the court below. The defence put up by both appellants, apart from denying that the words in the advertisement were defamatory of the respondent, is that the said advertisement was published on an occasion of absolute and/or qualified privilege.

[19] In the course of proceedings the second appellant applied under O 14A and/or O 33 rr 2 and 5 of the Rules of the High Court 1980 ('the RHC') for the issue of absolute/qualified privilege raised in the pleadings to be tried as a preliminary issue before the trial of other questions and for all further proceedings to be stayed. The issue was framed as follows:

> Whether upon the facts alleged and pleaded in paras 6, 7 and 10 of the statement of claim and the defence of absolute and/or qualified privilege raised and pleaded in paras 23 and 24 of the defence of the second defendant, the plaintiffs' claim is maintainable in law and/or in fact by reason of absolute/or qualified privilege.

[20] For ease of reference paras 6, 7 and 10 of the statement of claim are as follows:

> The first defendant had initiated an action to wind up the plaintiff through a petition ('the said winding up petition') for a debt of RM141,750, and the second defendant was the solicitor who filed the said petition for the first defendant.
>
> The said petition was enclosed and forwarded to the plaintiff by the second defendant through a letter from the second defendant dated 23 April 1999 which was only received by the plaintiff only on 27 April 1999.
>
> The plaintiff on receipt of said winding up petition although noting that the said winding up petition was only fixed for hearing on 3 September 1999, nevertheless attended to the matter immediately and expeditiously and in view of the same, was surprised and shocked when the first and second defendants caused the said winding up petition to be advertised and published on 12 May 1999 in a local daily newspaper, *The Star* ('the said advertisement') when there was seemingly no urgency to warrant the same and further compounded by the fact that the first defendant had received and was in possession of payment by the plaintiff, well before the date of publication of the said advertisement.

[21] The first appellant later by another application under the same provisions of the law also sought for determination of a preliminary issue before trial but limited itself to the defence of absolute privilege. It sought for an order 'That the question of law of whether the first defendant's defence of absolute privilege is applicable in the circumstances be determined pursuant to O 14A of the RHC' or 'Alternatively that the issue of absolute privilege be tried before the trial of the cause', under O 33 r 2 of the RHC. When both applications came before the learned judge, his Lordship directed the first appellant to adopt the issue as couched in the second appellant's application 'for the sake of convenience and to facilitate the proceedings.' (see the learned judge's grounds of judgment at p 17 of the appeal record). This is confirmed and conceded in the written submission of learned counsel for the first appellant in the court below wherein he stated:

> The first defendant adopts the issue stated in the second defendant's summons in chamber (encl 20).

[22] At the end of the day after considering the written submissions of the learned counsel for the respective parties the learned judge dismissed both applications with costs. Hence we had the aggrieved parties before us.

A THE FACTS

[23] The learned judge summarised the facts in his judgment as follows:

> The undisputed facts are as follows. The second defendant is a firm of solicitors and represented the first defendant in a winding up petition against the plaintiff company. The petition was filed on 22 March 1999 in respect of a debt of RM141,750 owed by the plaintiff to the first defendant. The petition was served on the plaintiff on 23 April 1999. The petition was published in *The Star* newspaper on 12 May 1999.
>
> Prior to the publication of the petition in *The Star* newspaper, the plaintiff, on Wednesday, 4 May 1999, tendered a cheque to the first defendant for the exact amount of indebtedness ie RM141,750. The first defendant presented the cheque to the bank for clearance on 6 May 1999, and it was cleared on 11 May 1999. As stated earlier, the petition was published by the defendants in the Star on Wednesday 12 May 1999, despite them having knowledge that the debt had been settled on 11 May.
>
> The plaintiff's cause of action against the defendant is based on libel, the subject matter of the libel being the advertising of the petition in *The Star* by the defendants subsequent to the settlement of the debt.
>
> The plaintiff alleges that there is malicious intention on the part of the defendants; since it has already settled the debt. The defendants, however, denies that there was malicious intention on their part on the grounds that there was a legal duty on their part to proceed with the advertisement of the petition notwithstanding the settlement of the debt by the plaintiff.

[24] While the undisputed facts, as summarized above, reflect the correct position as pleaded between the respondent and the appellant except that unlike the first appellant who admitted the settlement, the second appellant denied paragraphs 8 and 9 of the respondent's statement of claim which relate to these events/facts.

[25] Paragraphs 8 and 9 of the statement of claim read as follows:

> On receipt of the said letter of 23 April 1999, and the documents enclosed thereto, the plaintiff immediately attended to the said matter by forwarding a letter dated 29 April 1999 to the first defendant and enclosing a cheque for the sum of RM141,750 being full payment in respect of the outstanding debt.
>
> By a copy of the said letter of 29 April 1999, the first defendant through its Director one Tony Tay Beng Kong who was the Director who executed the Affidavit in support of the winding up petition, in an endorsement to the said letter acknowledged receipt of the said cheque for RM141,750 and undertook to withdraw all legal proceedings immediately thereafter. This endorsement by the said Tony Tay Beng Kong was signed off by him and dated 4 May 1999.

[26] It is perhaps for the reason of this denial that the second appellant omitted any mention of para s 8 and 9 of the statement of claim from the proposed issue that they framed. But these are facts which form the basis of the respondent's claim against both appellants. They concern the very actions of the appellants which the respondent took offence and alleged to be unjustifiable, malicious and reckless for being defamatory of the respondent and injurious to its reputation.

[27] In this respect, it is also pertinent to note that in its defence the first appellant also averred that 'at all material times in this action' it acted 'prudently and only upon advice from the second defendant (second appellant).' — see para 11.1 of first defendant's defence.

REJECTION OF PRELIMINARY ISSUE

[28] In his grounds of judgment the learned judge gave two reasons for dismissing the appellants' applications. His first and main reason is that:

> Since there is an allegation by the plaintiff of malicious intent on the part of the defendants, which the defendants deny (hence there is a dispute on a material fact), I do not think that it is appropriate that I should consider the issue of qualified privilege as raised by the defendants as a preliminary issue and without the need for a trial. It would have been a different matter if malicious intent is not an issue, or that the allegation of malicious intent is not disputed by the defendants.

[29] The defence of qualified privilege was specifically pleaded by both appellants in their defence.

[30] For convenience the first appellant's defence of absolute privilege and qualified privilege read as follows:

> The first defendant will contend that the advertisement was published on an occasion of absolute privilege in the particulars appearing at paras 4.1–4.6 above and which may be summarized as follows:
>
> > Summary of particulars of absolute privilege that the first defendant and the plaintiff were the petitioner and respondent respectively, in the Petition; and
> >
> > That the advertisement was published as part of the first defendant's statutory obligation in prosecuting the petition.
>
> Further and in the alternative, the words contained in the advertisement were published on an occasion of qualified privilege.
>
> > Particulars of Qualified Privilege
> >
> > That the first defendant will rely on the particulars provided in para s 9, 9.1 and 9.2 above to support this plea; and
> >
> > Additionally, the first defendant will content that the words contained in the Advertisement were a fair and accurate report and/or copy and/or extract of a public document maintained at the Registry of the High Court of Malaya, to wit, the petition.
>
> The second appellants' defence in para s 23 and 24 are in the following terms:
>
> > The second defendant aver that the plaintiff's claim is misconceived and not maintainable in law and in fact.
> >
> > Further or in the alternative, the second defendants aver that the publication of the said notice of advertisement was done and published on an occasion of absolute and/or qualified privilege.
> >
> > PARTICULARS
> >
> > (a) the said petition was issued pursuant to a proceeding in law;

A (b) the said notice of advertisement was published in the course of judicial proceedings;

(c) the said notice of advertisement was published pursuant to requirements in law.

[31] With the state of the pleadings as it were, one can hardly fault the learned B judge for viewing the issue of malicious intent which is in dispute as crucial to the claim and can only be resolved at a full trial.

[32] His second reason refers to the defence of absolute privilege which applicable law he felt had been miconceived by the appeallants. To quote him:

C

> Further, there is another difficulty: the defendants' application is based on a misconception of the law — the misconception being that under r 24 of the Company (Winding Up) Rules 1972 it was mandatory for them to advertise the petition. True, it was mandatory for them to advertise the petition within the prescribed period: but it was only mandatory if the defendants intended to proceed with the hearing of the petition. In the present case, D however, it was clear to the defendants that they had no reason to proceed with the petition as the debts had already been settled

[33] It is apparent that the learned judge felt the need for the parties not only to address the provisions of the law but also to factually establish the events that E transpired to necessitate the publication of the advertisement

THE APPELLANTS' CASE

[34] Before us learned counsel for the first appellant submitted that his application F only sought for a determination whether absolute privilege was applicable in respect of the advertisement. The issue is one of law and as his client only pleaded absolute privilege he relies on the second category of 'absolute privilege' in *Lincoln v Daniels* [1962] 1 QB 237 which was applied in this country in the case of *Thiruchelvasegaram a/l Manickavasegar v Mahadevi a/p Nadchatiram* [2000] 5 MLJ 465. In that case the second category of absolute privilege is said to cover 'everything that is done from G inception of the proceedings onwards and extends to all pleadings and other documents brought into existence for the purpose of proceedings and starting with the writ or other documents which institutes the proceedings.' He however conceded that the second category was not applied in *Thiruchelvasegaram*.

H **[35]** Learned counsel pointed out that the issue is whether the petitioner ('the first appellant') can surepticiously accept payment exclusively at the expense of other creditors. He referred to ss 219(2) and 223 of the Companies Act 1965 ('the Act') which provide for the winding up of a company to commence on presentation of a winding up petition and which render void any disposition of the property of the I company after such date unless the court otherwise orders. He also cited the decision of this court in *Kredin Sdn Bhd v Development & Commercial Bank Bhd* [1995] 3 MLJ 304, p 309 which held that s 219 was meant to protect creditors, particularly unsecured creditors, in that equal treatment must be maintained even during the interim period between the date of the presentation of the petition for winding up and the date when the order for winding up is made. He concluded by saying that

the respondent was the author of its own wrong as its failure to repay its debt is contrary to commercial integrity and morality. A

[36] Learned counsel for the second appellants adopted the submission of his learned colleague. He added that his clients were solicitors acting in the course of their duties as such when they caused the advertisement to be published. And since what they did was in the course of judicial proceedings, public policy requires them to be protected from claims for defamation for matters arising therefrom. Some English cases were cited as authority that no libel or slander lies against judges, counsel, witnesses or parties for words written or spoken in the ordinary course of judicial proceedings. As in the case of the first appellant, learned counsel for the second appellant also claimed to rely only on the defence of absolute privilege. B C

THE RESPONDENT'S REPLY

[37] On behalf of the respondent it was submitted that there was no duty on the part of the petitioner to advertise as the appellants did because r 24 of the Companies (Winding Up) Rules 1972 ('the Rules') clearly spells out that the petition only needs to be advertised 'seven clear days or such longer time as the court may direct before the hearing'. Learned counsel averred that there is no requirement of the Rules for the petition to be advertised in whatever circumstances. D E

[38] On the contrary he argued, the Rules makes provision for the petitioner to withdraw his petition at any stage. Rule 33(1)(b) in fact allows the petitioner to consent to the withdrawal of his petition or allow it to be dismissed. It was contended that as the debt in this case was extinguished by the encashment of the respondent's cheque for the full amount of the claim there was no longer reason to proceed with the petition or advertisement. Echoing the learned judge, learned counsel emphasized that r 24 only makes advertisement mandatory if the petitioner intended to proceed with the hearing of the petition. F

[39] It was the common stand of all parties that the petition was in fact withdrawn before the date fixed for its hearing but after the publication of the advertisement. G

THE FINDING

[40] It is obvious from their applications that the appellants wanted their case to be expeditiously proceeded with under O. 1 4A or O 33 r 2 of the RHC instead of the normal route of a full trial of the issues between the parties. For expedience the second appellant even framed the purported question of law as preliminary issue that was proposed to be determined. The sole issue confronting the learned trial Judge was whether to accede to such request which is an exercise of his judicial discretion. H I

[41] It is apparent from the arguments of learned counsel before us (as also in the written submission put in before the learned judge in the court below) that the appellants (likewise the respondent) had preempted the issue faced by the learned Judge. But to his credit, the learned judge did not miss the wood for the trees and

correctly resisted the temptation. He confined himself to matters relevant to the exercise of his discretion which was what was sought for at that stage of the proceedings and refrained from going into the merit of the proposed and adopted preliminary issue.

[42] The issue before us was whether the learned trial judge was correct in refusing to exercise his discretion under O 14A or O 33 r 2 of the RHC. Can one fault the learned judge for considering it inappropriate to take the issue of qualified privilege as a preliminary issue because he found a dispute on the allegation of malious intention which can only be resolved in a trial? And on the issue of absolute privilege he saw a misconception of law by the appellant as regards the requirement of r 24 of the Rules.

[43] Learned counsel for the first appellant sought for a determination only on the issue of absolute privilege saying that was his application and also the only pleaded defence of the first appellant. In adopting the same submission the second appellant purported to be acting in the course of their duties in publishing the said advertisement. With respect, the appellants cannot resile from their pleaded position. They both pleaded the defence of absolute and qualified privileges and the question framed and adopted also state both defences.

[44] Order 14A of the RHC provides for an accelerated final disposal of an action at an interlocutory stage to save time and expense which would otherwise arise if the action were to proceed to full trial. It empowers the court to make a final determination of a question of law without the need of an application under O 33 r 5 for the determination of a preliminary issue. Two requirements are however prescribed for its exercise:

(i) the question of law or construction is suitable for determination without full trial of an action, and

(ii) such determination will be final as to the entire cause or matter or any claim or issue therein.

[45] According to *Malaysian High Court Practice 2001* Desk Edition p 332:

> The test of whether the question of law or construction is suitable to be determined under this order is whether all the necessary and material facts relating to the subject matter of the question have been duly proved or admitted, and this postulates that there is no dispute or no further dispute as to the relevant facts at the time when the court proceeds to determine the question. The suitability of disposing of an action under this order depends entirely on whether the court can determine the question of law raised without a full trial of the action.

[46] and at p 333:

> The issue of law, if it is discernible at all, has to be discernible from the statement of claim and defence. If there could still be a debate as to whether on slightly different facts a cause of action might or might not exist, an application under O. 14A is inappropriate.

[47] The basis of the respondents' claim is the appellants' insistence in publishing the advertisement despite having given the undertaking to withdraw the petition upon the clearance by the bank of the respondent's cheque for full payment of claim. While the second appellant denied any knowledge of the alleged settlement, the first appellant claimed to only know about the clearance of the cheque on the day the advertisement was published and at the same time claiming to act at all times on the advice of the second appellant. These are disputes of fact which can only be resolved by evidence at a full trial. Therefore as an issue of law the question posed failed the test of suitability for determination under O 14A as earlier mentioned. It also assumes facts not discernible from the statement of claim and defence, hence inappropriate for pre-trial determination.

[48] On the issue of absolute privilege there is not only factual dispute but also misconception of the law. The first appellant claimed to cause the publication as part of his statutory obligation ie 'partial fulfillment' of the requirement of r 24. The second appellant purported to publish the advertisement 'pursuant to requirements in law'. The respondent's stand is that the petition is not required to be advertised unless the appellant is definitely proceeding with it and even then the publication may only be made within the period prescribed by rule 24 ie seven clear days before the hearing date. Here the publication was done on 12 May 1999, well before the hearing date fixed on 3 September 1999 and despite the undertaking and settlement. Thus, whether there was any necessity to publish and whether such publication was done pursuant to the requirement of the law were neither proven nor admitted.

[49] Further more, the line of defence taken gave the learned Judge the impression that there was a misconception of the law on the part of the appellant that advertisement is mandatory once a petition is filed when the law appears to view publication outside the prescribed period as a breach of the Rules and an irregularity — see *GKM Amal Bhd v Bank Utama (M) Bhd* [2004] 3 MLJ 12 (CA). The proposed issue is therefore obscure and not discernible from the pleadings. Particularly so when the pivotal averments in paras 9 and 10 of the statement of claim are still in dispute. In any event, s 221(2) of the Companies Act 1965 provides for the withdrawal of a winding up petition by the petitioner at any time.

[50] For the aforesaid reasons, the issue as framed is neither suitable nor possible for determination under O 14A.

[51] Order 33 r 2 of the RHC is apparently wider in scope as it encompasses

> any question or issue arising in a case or matter, whether of fact or law or partly of fact and partly of law, and whether raised by the pleadings or otherwise.

[52] The general rule as applied by the Singapore Court of Appeal in *Federal Insurance Co v Nakano Singapore (Pte) Ltd* (1992) 1 SLR 390, p 394 is that the court will not exercise its power under O 33 r 2 to order a preliminary point of law to be tried unless the trial of that issue will result in a substantial saving of time and expenditure in respect of the trial of the action.

Malaysian High Court Practice 2001 Desk Edition states — 'Ordinarily an order for the hearing before trial of a point of law raised by a pleading will be made only when the objection raises a serious question of law, which if decided in favour of the party applying for a preliminary trial, would dispense with the need for further trial of the remaining issues in the matter, or otherwise would substantially dispose of the cause or matter." Indeed in delivering the judgment of the Federal Court in *Chan Kum Loong v Hii Sui Eng* [1980] 1 MLJ 313, p 314 Chang Min Tat FJ said that a preliminary point of law which does not decide the matter between the parties one way or the other is an unjustified waste of time on occasions an equally unjustified increase in costs.

[53] To quote the dicta of Roche J in *Isaacs & Sons Ltd v Cook* [1925] 2 KB 391, 'A preliminary trial should not be ordered on matters where there is obscurity of facts or law or both, or where the application of the principles of law are wholly dependent on facts which have yet to be determined. It should only be ordered in respect of matters on which no further light would be thrown at the trial.'

[54] On the state of the pleadings as it were, the question framed, as adverted to earlier, ignored the bone of contention between the parties in favour of some erroneous assumption of fact and law that the publication was made pursuant to law. This obscurity of fact and law must first be determined before the question can be answered.

[55] In any event, the issue as framed incorporates both defences of absolute privilege and qualified privilege, hence two issues. Assuming that the facts are undisputed or admitted (when they are not) the answers would not dispose of the entire cause or matter unless held in the appellant's favour. It is not therefore a question that is appropriate for preliminary determination under O 33 as it would neither save time nor cost.

[56] To reiterate, there is in this case an obscurity of fact and law which further light can only be thrown at the trial. Therefore to entertain the application would be, to use the words of Chang Min Tat FJ, an unjustified waste of time and occasion an unjustified increase in costs.

CONCLUSION

[57] There is no doubt that the learned judge was excercising his judicial discretion when he refused the appellants' application under O 14A or O 33 r 2 of the RHC. Such decision is generally not interfered with by the appellate court unless it is 'plainly wrong' — see dicta of Lord Templeman in *Ashmore v Corp of Lloyd's (No 1)* [1992] 1 WLR 446 at p 454. We did not find any cause to intervene.

[58] The appeal was accordingly dismissed with costs. Deposit to the respondent to account of taxed costs. A

Appeal dismissed by a majority.

Reported by Andrew Christopher Simon B

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